IN THE

Supreme Court of the United States

JAMES OBERGEFELL, ET AL., AND BRITTANI HENRY, ET AL., PETITIONERS,

v.

RICHARD HODGES, DIRECTOR, OHIO DEPARTMENT OF HEALTH, ET AL., RESPONDENTS.

VALERIA TANCO, ET AL., PETITIONERS,

v.

WILLIAM EDWARD "BILL" HASLAM, GOVERNOR OF TENNESSEE, ET AL., RESPONDENTS.

APRIL DEBOER, ET AL., PETITIONERS,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, ET AL., RESPONDENTS.

GREGORY BOURKE, ET AL., AND TIMOTHY LOVE, ET AL., PETITIONERS,

v.

STEVE BESHEAR, GOVERNOR OF KENTUCKY, ET AL., RESPONDENTS.

On Writs of Certiorari to the United States Court of Appeals for the Sixth Circuit

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INTEREST OF *AMICI CURIAE*

Amici are constitutional law scholars who teach and write in the field. *Amici* have studied, written scholarly commentary on, and have a common professional interest in one of the issues presented in this case: Whether a classification based on sexual orientation triggers heightened scrutiny under this Court's equal protection jurisprudence.

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SUMMARY OF ARGUMENT

For decades, this Court has considered four factors in determining whether a law that discriminates against any particular group should be tested by heightened judicial scrutiny: (1) whether the group has experienced a history of invidious discrimination; (2) whether the defining characteristic of the group is relevant to one's ability to contribute to society; (3) whether the group can effectively protect itself against discrimination through the political process; and (4) whether an individual can, without sacrificing a core aspect of her identity, effectively opt out of the group. Applying those factors, classifications based on sexual orientation clearly warrant heightened scrutiny, as the Ninth and Seventh Circuits have held, and as this Court has strongly implied.

1. Gay and lesbian individuals have suffered a history of purposeful discrimination, both private and legal. They have been ostracized, humiliated, prosecuted, denied private and government employment, and denied the right to form a family. Few groups in American history have experienced such persistent and pervasive discrimination.

2. A person's sexual orientation is irrelevant to her ability to contribute to society. Sexual orientation is not in any way a disability that renders an individual less capable of being a lawyer, doctor, policeman, parent, teacher, or judge. It is a classic example of a personal characteristic that has no legitimate bearing on one's competence, skill, or value as a human being.

3. Gay and lesbian individuals have limited ability to protect themselves through the political process against continued public and private discrimination. Despite some recent successes in a few jurisdictions,

attempts to secure federal and state antidiscrimination legislation often have failed, and many recent strides toward equality have been swiftly rolled back by aggressive ballot initiatives. The barriers to gay and lesbian persons achieving equal respect, equal dignity, and equal rights through the political process remain daunting, and private discrimination and hostility are still often both widespread and fierce.

4. Gay and lesbian individuals share a common "immutable" characteristic, both because sexual orientation is fundamental to their identity, *Lawrence v. Texas*, 539 U.S. 558, 576-77 (2003), and because one's sexual orientation is not changeable through conscious decision, therapeutic intervention, or any other method.

Finally, there is no *stare decisis* reason for failing to apply heightened scrutiny. To the contrary, this Court's decision in *United States v. Windsor*, 133 S.Ct. 2675, 2693 (2013), effectively applied a heightened standard of scrutiny for claims of sexual orientation discrimination, building upon this Court's earlier decisions in *Lawrence* and *Romer v. Evans*, 517 U.S. 620 (1996), as the Seventh and Ninth Circuits have correctly recognized. *See Latta v. Otter*, 771 F.3d 456, 468 (9th Cir. 2014), *reh. en banc denied*, 2015 WL 128117 (9th Cir. Jan. 9, 2015); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 481-82 (9th Cir. 2014), and *Baskin v. Bogan*, 766 F.3d 648, 671 (7th Cir.), *cert. denied*, 135 S.Ct. 316 (2014).

Accordingly, this Court should apply the traditional four-factor test and hold that laws that discriminate on the basis of sexual orientation are subject to heightened scrutiny.

ARGUMENT

I. THE CONSTITUTION REQUIRES HEIGHTENED JUDICIAL SCRUTINY OF LAWS THAT DISCRIMINATE AGAINST GAY AND LESBIAN PERSONS

The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Laws that distinguish among individuals in the distribution of benefits or burdens generally are presumed valid, and will be sustained, if they are "rationally related to a legitimate [government] interest." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). But that "general rule gives way" when the law in question classifies based on factors that "reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others." *Id.* "Legislation predicated on such prejudice is. . . incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). The Court has held that any law that classifies on the basis of such a characteristic must be tested by heightened judicial scrutiny to pass constitutional muster. *See, e.g., Loving v. Virginia*, 318 U.S. 1 (1967) (race); *Graham v. Richardson*, 403 U.S. 365 (1971) (alienage); *Clark v. Jeter*, 486 U.S. 456 (1988) (legitimacy); *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (sex/gender).[2]

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[2] A law that singles out such a class for disparate treatment must be narrowly tailored to serve a compelling government interest. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S.

In determining whether heightened scrutiny is appropriate, courts generally consider four factors: (1) whether the group has experienced a history of invidious discrimination, *Massachusetts Bd. of Ret. v. Murgia*, 427 U.S. 307, 313 (1976) (per curiam); (2) whether the discrimination is based on "'stereotyped characteristics not truly indicative'" of the group's abilities, *Cleburne*, 473 U.S. at 441 (quoting *Murgia*, 427 U.S. at 313); (3) whether members of the group have "'obvious, immutable, or distinguishing characteristics that define them as a discrete group,'" *Bowen v. Gilliard*, 483 U.S. 587, 602 (1987); and (4) whether the group lacks the capacity adequately to protect itself in the political process, *Lyng v. Castillo*, 477 U.S. 635, 638 (1986).

The Court has not insisted that all four factors be present in every instance. For example, in some cases the Court has applied heightened scrutiny despite a group's substantial political power or the ability of individuals to opt out of the class. *See, e.g.*, *Adarand*, 515 U.S. at 235 (holding that *all* racial classifications are inherently suspect); *Nyquist v. Mauclet*, 432 U.S. 1, 9 n.11 (1977) (resident aliens are a suspect class notwithstanding their ability to opt out of the class).[3]

200, 235 (1995). Governmental classifications that categorically exclude on the basis of gender, for example, fail to pass constitutional muster unless supported by "exceedingly persuasive justifications" to which the classifications must "substantially relate," with the burden of justification "demanding" and "rest[ing] entirely on the State." *Virginia*, 515 U.S. at 531 (citing *Mississippi Univ. for Women*, 458 U.S. at 724). The State justification must be "genuine, not hypothesized or invented *post hoc* in response to litigation" and must not rest upon stereotypes or generalized notions. *Id.*

[3] *See also Cleburne*, 473 U.S. at 442 n.10 ("'[T]here's not much left of the immutability theory, is there?'" (quoting John Hart Ely,

In general, however, the Court considers these four factors in deciding whether heightened scrutiny is appropriate.

Consideration of these factors establishes that laws that discriminate against gay men and lesbians must be subjected to heightened judicial scrutiny. Gay men and lesbians have long suffered a history of discrimination across all facets of life; sexual orientation has no bearing on an individual's ability to contribute to society; gay and lesbian individuals have historically faced significant obstacles to protecting themselves from discrimination through the democratic process; and sexual orientation is immutable or, at a minimum, is a defining characteristic that an individual ought not be compelled by law to change in order to avoid discrimination.

A. Gay Men And Lesbians Have Faced A Long History Of Discrimination

Gay and lesbian individuals historically have been, and continue to be, the target of purposeful and harmful discrimination because of their sexual orientation. For centuries, the prevailing attitude toward gay persons has been "one of strong disapproval, frequent ostracism, social and legal discrimination, and at times ferocious punishment." Richard A. Posner, *Sex and Reason* 291 (1992); *see also* Evan

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Democracy and Distrust: A Theory of Judicial Review 150 (1980))); *id.* at 472 n.24 (Marshall, J., concurring in judgment in part and dissenting in part) ("The 'political powerlessness' of a group may be relevant, but that factor is neither necessary, as the gender cases demonstrate, nor sufficient, as the example of minors illustrates."); *Frontiero v. Richardson*, 411 U.S. 677, 686 & n.17 (1973) (plurality op.) (applying intermediate scrutiny to women while finding that they "do not constitute a small and powerless minority").

Gerstmann, *The Constitutional Underclass: Gays, Lesbians, and the Failure of Class-Based Equal Protection* 62 (1999) (cataloguing the "numerous legal disadvantages" suffered by gay men and lesbians "in twentieth-century America"). Gay men and lesbians have been denied employment, targeted for violence, publicly humiliated, and treated as perverts, sinners, and criminals.[4]

The long history of discrimination against gay men and lesbians in this country, has been recounted at length by numerous historians, other amici, and courts. *See, e.g., Pedersen v. Office of Pers. Mgmt.*, 881 F. Supp.2d 294, 314-15 (D. Conn. 2012); *Golinski v. United States Office of Pers. Mgmt.*, 824 F.Supp.2d 968, 985-86 (N.D. Cal. 2012), *cert. denied*, 133 S. Ct. 2887 (2013); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 981-91 (N.D. Cal. 2010), *aff'd*, 671 F.3d 1052 (9th Cir. 2012), *vacated sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013). It therefore suffices for present purposes to provide only a few of many examples of the historical discrimination against this group in almost every facet of American life.

The United States government's own practices provide ample evidence of widespread, government-sanctioned discrimination against gay and lesbian persons. During World War II, for example, the military systematically screened out lesbians and gay men from the armed forces and denied benefits to those who had served their nation. Nathaniel Frank, *Unfriendly Fire: How the Gay Ban Undermines the*

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[4] *See also Rowland v. Mad River Local Sch. Dist.*, 730 F.2d 444 (6th Cir. 1984), *cert. denied*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting) ("[H]omosexuals have historically been the object of pernicious and sustained hostility.").

Military and Weakens America 9-11 (2009). During the 1950s, President Eisenhower issued an executive order requiring the discharge of gay and lesbian employees from all federal employment and mandating that defense contractors and other private corporations with federal contracts ferret out and fire all gay and lesbian employees.[5] The federal government's employment discrimination against gay men and lesbians continued until the late 1990s. *See* Exec. Order No. 13,087 of May 28, 1998, 63 Fed. Reg. 30,097 (June 2, 1998). As recently as 1993, the federal government enacted the "Don't Ask, Don't Tell" policy, forcing service members to conceal their sexual orientation to avoid discharge. That policy remained in effect until late 2010. 10 U.S.C. §654(b) (2006), *repealed by* Pub. L. No. 111-321, §2(f)(1)(A), 124 Stat. 3515, 3516 (2010).

From 1917 to 1990 Congress prohibited gay and lesbian immigrants from entering the country. *See* Immigration Act of 1917, Pub. L. No. 64-301, §3, 39 Stat. 874, 875 (1917) (requiring exclusion of "persons of constitutional psychopathic inferiority"); Immigration and Nationality Act, amended October 3, 1965, Pub. L. No. 89-236, §15(b), 79 Stat. 911, 919 (adding "sexual deviation" as ground for denying entry into U.S.); 8 U.S.C. §1182(a)(4) (1982) (prohibiting gay persons from entering this country); Immigration Act of 1990, Pub. L. No. 101-649, §601, 104 Stat. 4978,

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[5] "At the height of the McCarthy witch-hunt, the U.S. State Department fired more homosexuals than communists. In the 1950s and 1960s literally thousands of men and women were discharged or forced to resign from civilian positions in the federal government because they were suspected of being gay or lesbian." George Chauncey, *Why Marriage? The History Shaping Today's Debate Over Gay Equality* 6 (2004).

5067-77 (1990) (finally eliminating "sexual deviants" from list of excludable aliens).

Gay and lesbian individuals have also faced legal discrimination in the domestic sphere. For example, state laws, including in Michigan, Ohio, Kentucky, and Tennessee, historically prohibited (and some still prohibit) gay men and lesbians from entering into civil marriage (or from having their marriages recognized) and same-sex couples from serving as foster or adoptive parents. *See, e.g.*, Mich. Const., art. 1, §25 and Mich. Comp. Laws. §§551.1-551.4 and 551.7; Ohio Const., art. XV, §11 and Ohio Rev. Code §3101.01(C); Ky. Const. §233A and K.R.S. §§402.005, 402.020(1)(d), 402.040(2), and 402.045; and Tenn. Const. art. XI, §18 and Tenn. Code Ann. §36-3-113; Miss. Code Ann. §93-17-3(2) (2000) (prohibiting "[a]doption by couples of the same gender"); Utah Code Ann. §78-30-1(3)(b) (2006) (prohibiting "a person who is cohabiting in a relationship that is not legally valid and binding marriage under the laws of [Utah] from adopting through a public state agency"); *see also Opinion of the Justices*, 525 A.2d 1095, 1098-100 (N.H. 1987) (finding that legislature's proposal excluding gay and lesbian persons from foster care and adoption did not violate state or federal equal protection clauses); *Howard v. Child Welfare Agency Review Bd.*, No. CV 1999-9881, 2004 WL 3154530, at *10-12 (Ark. Cir. Dec. 29, 2004) (upholding law forbidding placement of children in foster care of gay or lesbian persons), *aff'd*, 238 S.W.3d 1 (Ark. 2006).

Perhaps the most telling evidence of the animus and discrimination against gay men and lesbians is the legacy of widespread criminalization of sexual conduct between consenting adults of the same sex. *See Bowers v. Hardwick*, 478 U.S. 186, 192 (1986),

overruled by Lawrence, 539 U.S. at 578; *see also Baker v. Wade*, 769 F.2d 289, 292 (5th Cir. 1985) ("[T]he strong objection to homosexual conduct ... has prevailed in Western culture for the past seven centuries ...."). Such laws, the Supreme Court ultimately recognized, unlawfully "demean [the] existence" of gay and lesbian individuals. *Lawrence*, 539 U.S. at 578.

In a society in which homosexuality was excoriated as a heinous sin, the law branded it a serious crime, and the medical profession treated gay persons as diseased freaks of nature, individuals who suspected themselves of harboring desires for a member of the same sex were made to feel inferior and reviled. Gay men and lesbians attempted, often desperately, to hide their secret shame from family, friends, neighbors, and associates. Fear of discovery kept the secret lives of most gay men and lesbians invisible, even to one another. In short, gay men and lesbians have endured significant and longstanding discrimination in this country. Every court to have considered that question has come to the same conclusion.[6]

B. Sexual Orientation Is Irrelevant To An Individual's Ability To "Contribute To Society"

Another critical factor in the Court's heightened scrutiny analysis is whether the group in question is distinctively different from other groups in a way that

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[6] That gay men and lesbians have not historically been disenfranchised does not diminish this undeniable history of discrimination; the Supreme Court has never required a history of disenfranchisement to trigger heightened scrutiny. *See, e.g.*, *Lalli v. Lalli*, 439 U.S. 259, 264-66 (1978) (recognizing illegitimacy as a quasi-suspect class).

"'frequently bears [a] relation to ability to perform or contribute to society.'" *Cleburne*, 473 U.S. at 440-41; *see also Frontiero*, 411 U.S. at 686 (plurality op.) ("[W]hat differentiates sex from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society.").

In *Cleburne*, the Court ruled that heightened scrutiny was inappropriate for laws discriminating against people who are "mentally retarded," because such individuals "have a reduced ability to cope with and function in the everyday world." 473 U.S. at 442. Similarly, heightened scrutiny was not considered appropriate in reviewing mandatory retirement laws because "physical ability generally declines with age." *Murgia*, 427 U.S. at 315; *see also Gregory v. Ashcroft*, 501 U.S. 452, 472 (1991).

As numerous courts, scholars, and the American Psychological Association have recognized, homosexual orientation "'implies no impairment in judgment, stability, reliability or general social or vocational capabilities.'" *Jantz v. Muci*, 759 F. Supp. 1543, 1548 (D. Kan. 1991) (quoting Resolution of the American Psychological Association (Jan. 1985)), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992); *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring in the judgment) ("Sexual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'"); Laurence H. Tribe, *American Constitutional Law* §16-33 (2d ed. 1988) ("[H]omosexuality bears no relation at all to [an] individual's ability to contribute fully to society."); Am. Psychiatric Ass'n, *Position Statement*

On Homosexuality and Civil Rights, 131 Am. J. Psychiatry 436, 497 (1974).[7]

Indeed, gay men and lesbians can and do perform perfectly well as contributing members of society in every profession and facet of community life—when they are permitted to do so. Thus, the Supreme Court's observation that race, gender, alienage, and national origin "are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy," is equally applicable to gay men and women. *Cleburne*, 473 U.S. at 440.

C. Gay Men And Lesbians Lack Sufficient Political Power To Protect Themselves Against Invidious Discrimination

That gay and lesbian individuals as a group possess limited ability to protect themselves in the political process also weighs in favor of heightened scrutiny of laws that discriminate against such individuals.

1. Initially, as the Court has repeatedly made clear, the fact that a group has some political influence does not in any way foreclose—or even weigh significantly against—the need for heightened scrutiny. To the contrary, the Court invokes heightened scrutiny to test the constitutionality of laws that discriminate

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[7] *See also Conaway v. Deane*, 932 A.2d 571, 609 (Md. 2007) ("Gay. . . persons. . . have been subject to unique disabilities not truly indicative of their abilities to contribute meaningfully to society."); *Hernandez v. Robles*, 855 N.E.2d 1, 28 (N.Y. 2006) (Kaye, C.J., dissenting) ("Obviously, sexual orientation is irrelevant to one's ability to perform or contribute.").

against groups that possess significant political influence.[8]

African-Americans, for example, had made significant political gains at the time of many of the Court's most important decisions applying strict scrutiny to racial classifications. To illustrate, although fourteen states had repealed their anti-miscegenation statutes in the fifteen years leading up to *Loving*, 388 U.S. at 6 n.5, the Court nevertheless unanimously applied strict scrutiny to a law that discriminated against African-Americans.

Women, too, had achieved substantial political successes when heightened scrutiny was first applied to sex-based classifications. The *Frontiero* plurality observed, for example, that "the position of women in America ha[d] improved markedly in recent decades." 411 U.S. at 685. Congress had enacted several statutory prohibitions on sex-based discrimination (including Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963), and both houses of Congress had garnered the supermajorities necessary to pass the Equal Rights Amendment. *Id.* at 687. The plurality nonetheless correctly concluded that

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[8] While we recognize that the attainment of high political office by someone belonging to a particular group may have little if any correlation with the degree to which the group *qua* group enjoys political power, it is worth noting that racial minorities have served as President of the United States, Attorney General, Secretary of State, and held numerous other state and federal positions. The 114th Congress contains 44 African-Americans. Similarly, women have served as Secretary of State, Attorney General, Speaker of the House, Secretary of Health and Human Services, and Secretary of Homeland Security, and have held numerous additional powerful state and federal positions. The 114th Congress contains 104 women, including 20 senators.

heightened scrutiny should apply to laws that discriminate on the basis of sex, citing the "long and unfortunate history of sex discrimination." *Id.* at 684.[9]

2. There is little doubt that the consideration of limited political power weighs heavily in favor of heightened scrutiny of laws that discriminate against gay men and lesbians.

Gay men and lesbians have often failed in attempts to secure federal or state legislation to limit discrimination against them. Women and racial minorities, by contrast, have long enjoyed such protections. For example, twenty-nine states still have no laws prohibiting discrimination against gays and lesbians in employment, housing, or public accommodations, notwithstanding the history of discrimination discussed above. *See* Human Rights Campaign, *Statewide Employment Laws and Policies* (Jan. 15, 2014), http://www.hrc.org/files/assets/resources/employment_laws_1-2014.pdf; *see also* Letter from United States GAO to Hon. Tom Harkin et al., *Sexual Orientation and Gender Identity Employment*

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[9] Moreover, the Court has applied heightened scrutiny even to classes that have historically been among the most politically powerful in the nation. *See Craig v. Boren*, 429 U.S. 190, 208-10 (1976) (men); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 494 (1989) (whites); *Adarand*, 515 U.S. at 227-31 (same). The Court in these cases was fully aware of the substantial political power held by those groups. *See Craig*, 429 U.S. at 219 (Rehnquist, J., dissenting) ("There is no suggestion in the Court's opinion that males in this age group are in any way peculiarly disadvantaged ...."); *Croson*, 488 U.S. at 495 ("*Even were we* to accept a reading of the guarantee of equal protection under which the level of scrutiny varies according to the ability of different groups to defend their interests in the representative process, heightened scrutiny would still be appropriate in the circumstances of this case." (emphasis added)).

Discrimination: Overview of State Statutes and Complaint Data (Oct. 1, 2009), http://www.gao.gov/new.items/d10135r.pdf.

In the last two decades, more than two-thirds of ballot initiatives that proposed to enact (or prevent the repeal of) basic employment antidiscrimination protections for gay and lesbian individuals have failed. *See* Brad Sears et al., Williams Institute, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* 13-2 (2009), http://williamsinstitute.law.ucla.edu/research/work-place/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-emploment.[10]

Moreover, in some instances hard-fought gains in the battle for equal rights for gay men and lesbians have been rolled back by aggressive ballot initiatives. Voters have used initiatives or referenda to repeal or prohibit equal marriage rights for same-sex couples on thirty-three occasions in recent years. In short, "more frequently than any other group" gay men and lesbians have had to respond to ballot initiatives "erect[ing] barriers against basic civil rights protections." *Id.* at 13-1.

The prevalence of violence directed at gay and lesbian individuals is also a strong indicator of relative powerlessness. Anti-gay hate crimes increased dramatically between 2003 and 2008, and hate crimes

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[10] *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 Mich. L. Rev. 1363, 1393 (2011) ("It hardly follows that a group is politically 'powerful' because it has achieved some success in securing legal remedies against some of the formal and informal discrimination that has long burdened the group.").

targeting lesbian and gay individuals represent an increasingly large share of total hate crimes in the United States. *See* 153 Cong. Rec. S12,202 (daily ed. Sept. 27, 2007) (statement by Sen. Dianne Feinstein) (noting that 8 out of 100,000 African Americans report being a victim of a hate crime, as do 13 out of 100,000 LGB people). The threat of private discrimination and violence further undermines the ability of many gay and lesbian people to participate fully in the political process by encouraging them to stay "in the closet." Although recent increased acceptance in some areas of the country has encouraged more gay and lesbian individuals to live openly, many remain personally and politically "invisible."[11]

Gay and lesbian individuals also remain "vastly under-represented in this Nation's decisionmaking councils." *Frontiero*, 411 U.S. at 686 n.17. Fewer than ten openly gay persons currently serve in the Congress.[12] The Connecticut Supreme Court observed in 2008 that, of the more than half million people who then held political office at the local, state, and national levels in this country, only about 300 were openly gay. *See Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 446 (Conn. 2008).[13] In light of the very

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[11] *See* Schacter, *supra*, at 1384-86 (describing Professor Segura's testimony in *Perry v. Schwarzenegger*).

[12] David R. Sands, *113th Congress Mirrors Increasingly Diverse U.S.*, Wash. Times, Jan. 7, 2013, http://www.washingtontimes.com/news/2013/jan/7/113th-congress-mirrors-increasingly-diverse-us/#ixzz2KHEmHzJj.

[13] The ability to hide one's sexual orientation is a hindrance rather than an aid in securing rights. As Justice Brennan (joined by Justice Marshall) put it: "homosexuals constitute a significant and insular minority of this country's population. Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group

small number of openly gay public officials in the United States today, it is reasonable to conclude that lesbians and gay men have only one-fiftieth the representation they would have in the halls of government if it were not for the past and present discrimination against them.[14] It is therefore not surprising that this Court acknowledged in *Windsor* that gay men and lesbians are "'a politically unpopular group.'" *Windsor*, 133 S. Ct. at 2693 (quoting *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534-35 (1973)).

It is true that there have been some recent political successes. However, a modicum of success in select jurisdictions is insufficient to establish that a historically oppressed and subordinated group can adequately protect itself in the political process more generally. *See Loving*, 388 U.S. at 6 & n.5; *see generally* Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv. L. Rev. 713, 742 (1985) (arguing that the Court's focus should be on "systematic disadvantages that undermine our system's legitimacy"); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 145-70 (1980) (discussing how deep-seated prejudice can distort the political process). The barriers to achieving equal respect, equal dignity, and

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are particularly powerless to pursue their rights openly in the political arena." *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting).

[14] Although the exact number of gay men and lesbians in the U.S. is unknown, a 2012 Gallup poll reported that 3.4% of Americans self-identify as lesbian, gay, bisexual, or transgender. Gary J. Gates & Frank Newport, Gallup Politics, *Special Report: 3.4% of U.S. Adults Identify as LGBT* (Oct. 18, 2012), http://www.gallup.com/poll/158066/special-report-adults-identify-lgbt.aspx. But only .06% of public officials are openly gay. *Kerrigan*, 957 A.2d at 446.

equal rights through the political process remain daunting, especially at the state level, where a substantial majority of jurisdictions still fervently opposes equal rights for gay men and lesbians, and where private discrimination is still often widespread and fierce. Just as the repeal of anti-miscegenation laws in some states was insufficient to prevent the *Loving* Court from employing heightened scrutiny to invalidate such laws in 1967, and just as laws prohibiting discrimination against women were insufficient to prevent the Court from employing heightened scrutiny to invalidate laws discriminating against women since the 1970s, so too are scattered victories in a handful of states an insufficient basis on which to reject heightened scrutiny for laws that discriminate against gay and lesbian individuals today.

D. Sexual Orientation Is An "Immutable" Or "Defining" Characteristic

In deciding whether heightened scrutiny is appropriate, the Court has looked with particular suspicion upon laws that discriminate on the basis of "'immutable . . . or distinguishing characteristics that define [persons] as a discrete group.'" *Gilliard*, 483 U.S. at 602 (quoting *Lyng*, 477 U.S. at 638). This consideration derives from the "'basic concept of our system that legal burdens should bear some relationship to individual responsibility.'" *Frontiero*, 411 U.S. at 686; *cf. Fatin v. INS*, 12 F.3d 1233, 1239-40 (3d Cir. 1993) (Alito, J.) (characteristic is "'immutable'" when "'members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences'").

Accordingly, a law is more likely to receive heightened scrutiny if it discriminates against an individual

based on a characteristic that she either cannot realistically change, or ought not be compelled to change because it is fundamental to her identity. *See, e.g.*, *Plyler*, 457 U.S. at 220 (noting that illegal alien children "have little control" over that status); *Nyquist*, 432 U.S. at 9 n.11 (treating resident aliens as a suspect class despite their ability to opt out of that class); *Steffan v. Perry*, 41 F.3d 677, 689 n.9 (D.C. Cir. 1994) (noting that classification based on religion "would trigger strict scrutiny").[15]

Sexual orientation clearly falls within this category of defining personal characteristics. As the Court has acknowledged, sexual orientation is so fundamental to a person's identity that one ought not be forced to choose between one's sexual orientation and one's rights as an individual even if such a choice could be made. *See Lawrence*, 539 U.S. at 576-77 (recognizing that individual decisions by consenting adults concerning intimacies of their physical relationships are "an integral part of human freedom").[16] In any event,

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[15] The Court has on several occasions applied heightened scrutiny to laws that discriminate against a group whose defining characteristics are capable of alteration. These characteristics need not manifest in the form of an "obvious badge"; they often may be disclosed or suppressed as a matter of preference. *See Mathews v. Lucas*, 427 U.S. 495, 505-06 (1976); *see also Watkins*, 875 F.2d at 726 (Norris, J., concurring in judgment) ("It is clear that by 'immutability' the [Supreme] Court has never meant strict immutability.... At a minimum, ... the Supreme Court is willing to treat a trait as effectively immutable if changing it would involve great difficulty, such as requiring a major physical change or a traumatic change of identity.").

[16] *See also, e.g.*, *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("Because ... sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment."); *Kerrigan*, 957 A.2d at 438 ("In view

there is now broad medical and scientific consensus that sexual orientation *is* an immutable characteristic. Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults*, 7 Sex Res. Soc. Policy 176 (2010).

Nor is there any meaningful distinction between the "status" of being gay—a characteristic that defines a class—and "the propensity to engage in a certain kind of conduct" identified with being gay. The Court has emphatically rejected attempts to draw a distinction between "status and conduct" in defining the rights of "homosexual persons." *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the Law v. Martinez*, 130 S. Ct. 2971, 2990 (2010) ("*CLS*"); *Lawrence*, 539 U.S. at 575 ("When homosexual *conduct* is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual *persons* to discrimination ...." (emphasis added)); *see also id.* at 567 ("[I]t would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."); *id.* at 583 (O'Connor, J., concurring in judgment) ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, [the] law is targeted at more than conduct. It is instead directed toward gay persons *as*

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of the central role that sexual orientation plays in a person's fundamental right to self-determination, we fully agree with the plaintiffs that their sexual orientation represents the kind of distinguishing characteristic that defines them as a discrete group ...."); *Golinski*, 824 F. Supp. 2d at 987 ("[S]exual orientation is so fundamental to one's identity that a person should not be required to abandon it.").

a class." (emphasis added)). Many earlier decisions were grounded on the now-discredited theory that homosexual *behavior* is changeable and therefore homosexuality is not immutable. Those decisions do not survive *Lawrence*, *CLS*, or *Windsor*.[17] *See Windsor*, 133 S. Ct. at 2690 (concluding that DOMA was "directed to a class of persons" worthy of protection, *e.g.*, same-sex couples).

E. Stare Decisis Poses No Impediment To Application Of Heightened Scrutiny

This Court's recent decisions regarding the rights of gay and lesbian individuals suggest that heightened scrutiny is appropriate in this context. And *Baker v. Nelson*, 409 U.S. 810 (1972), does not foreclose application of heightened scrutiny here.

In *Baker*—a summary dismissal of an appeal from a state court decision holding that gay men do not have a federal constitutional right to marry—the appellants did not argue for heightened scrutiny, so the issue was not before the Court. *See* Appellant's Jurisdictional Statement 3, *Baker v. Nelson*, No. 71-1027 (S. Ct. filed Feb. 11, 1972) ("Questions Presented"); *see also Illinois State Bd. Of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979) (summary disposition does not decide questions that "'merely lurk[ed] in the record'" (citation omitted)).

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[17] *E.g.*, *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990). Somewhat ironically, other lower court decisions applying rational basis review *did* recognize the status/conduct problem; they relied on *Bowers* and reasoned that it would be "anomalous ... to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny." *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987); *see infra* at 28-29 & n.20.

In any event, both this Court's interpretation of the Equal Protection Clause and legal, medical, cultural, and social attitudes towards sexual orientation have changed so profoundly since 1972 that the summary dismissal in *Baker* should hold little, if any, precedential sway today. *See Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975) (a summary dismissal is not binding if it has been undermined by subsequent "doctrinal developments"). Among other significant developments since *Baker*, the State may no longer "demean [gay and lesbian persons'] existence or control their destiny by making their private sexual conduct a crime." *Lawrence*, 39 U.S. at 578 (overruling *Bowers v. Hardwick*).

Moreover, although this Court's decisions in *Romer*, *Lawrence*, and *Windsor* did not squarely address the issue of heightened scrutiny, they have come to be understood as supporting such an analysis. *See Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (holding that *Lawrence* supported a finding of a history of discrimination and application of heightened scrutiny), *aff'd on other grounds*, 133 S. Ct. 2675, *cert. denied*, 133 S. Ct. 2885 *and* 133 S. Ct. 2884 (2013); *SmithKline Beecham Corp.*, 740 F.3d at 481 and (reviewing the constitutionality of a peremptory strike against a gay venire person and recognizing that, "[i]n its words and its deed, *Windsor* established a level of scrutiny for classifications based on sexual orientation that is unquestionably higher than rational basis review," and that *Windsor* "reinforces the constitutional urgency of ensuring that individuals are not excluded from our most fundamental institutions because of their sexual orientation"); *Latta*, 771 F.3d at 467-68 (following *SmithKline*); *Baskin*, 766 U.S. at 671-72 (same).

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"[T]he judiciary's role under the Equal Protection Clause is to protect 'discrete and insular minorities' from majoritarian prejudice or indifference." *Croson*, 488 U.S. at 495. It is not seriously disputed that gay men and lesbians have experienced a history of purposeful discrimination on the basis of a characteristic that bears no relation to their ability to contribute to society. Gay men and lesbians also lack sufficient political power to protect themselves against continued discrimination. Sexual orientation is both fundamental to one's identity, *Lawrence*, 539 U.S. at 576-77, and not changeable through conscious decision, therapeutic intervention, or any other method. To provide direction to the lower courts, and in light of the shift in medical, cultural, and social attitudes towards sexual orientation, it is time for this Court to make express what it has heretofore only implied: Laws that discriminate on the basis of sexual orientation are subject to heightened scrutiny.

CONCLUSION

For the foregoing reasons, this Court should hold that laws that classify individuals for disparate treatment on the basis of their sexual orientation trigger heightened scrutiny.

Respectfully submitted,

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